A

SUNDRAM VEERIAH

v.

MAGNIFICIENT DIAGRAPH SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
PRASAD SANDOSHAM ABRAHAM JC
[SUIT NO: S-22-403-2006]
2 NOVEMBER 2010

C ***TORT:*** *Negligence - Duty of care - Breach of - Defective product causing injury to plaintiff - Whether defendant's duty of care to ensure product had SIRIM approval - Whether plea of contributory negligence rejected - Whether defendants found to be liable*

D This was the plaintiff's case against the defendant for breach of duty of care in the defendant's selling of an impact drill model no ZIJ-DQ75-RE (the said product) to the plaintiff by the defendant. Briefly, the plaintiff had seen an advertisement in the newspaper taken out by the defendant offering for sale several items at its E store including the said product. It was represented that the said product was SIRIM approved, imported with the approval of the Suruhanjaya Tenaga and sold at the price of RM49.90. The defendant was a major hypermarket carrying a worldwide brand named Carrefour. The plaintiff had attempted to use the said F product by drilling a hole for curtain railings. However, the drill had vibrated when in use and had hit the plaintiff on the side of his face causing injury to the plaintiff. The defendant in evidence confirmed that there was no SIRIM approval for the said product and neither was there approval for the importing of the said G product. The plaintiff suffered injury and loss and now brought this suit against the defendant.

Held (allowing plaintiff's case):

(1) The said product was imported from the manufacturer in H China through a company known as Seng Huat Heng Hardware Sdn Bhd (the supplier) and thereafter by virtue of arrangements between the defendant and the supplier, the product was placed on the shelves of the defendant's hypermarket. Under these circumstances, it was just and fair I that the law imposed a duty of care on the defendant to the plaintiff to at least ensure that the product had SIRIM

approval and was imported with approval from Suruhanjaya Tenaga. The defendant admitted they only did random checking on some of the boxes containing the said product but did not do a complete check before the products were placed on the shelves of the defendant's hypermarket. (para 11)

(2) Any damage suffered by the plaintiff was reasonably foreseeable. A defective or underperforming product would cause the injury that was caused herein and it was for this reason the said product required SIRIM approval before approval could be granted to import the said product by the supplier. The circumstances as a whole must be such that it was fair, just and reasonable for the imposition of the duty of care and this ingredient had been satisfied from the evidence led by the plaintiff. (para 13)

(3) As to the issue of contributory negligence raised by the defendant by the suggestion that the plaintiff had applied excessive pressure in the use of the said product which caused the said product to be defective, evidence showed that the plaintiff had been trained in the use of a drill like the said product. At any rate, since the instruction manual was missing from the box, it would be difficult for the plaintiff to know the level of pressure to be applied when using the said drill. The plaintiff had taken reasonable care and had behaved reasonably. Any plea of contributory negligence on the part of the plaintiff was rejected. (paras 14 & 15)

(4) Having looked at the medical report by the plaintiff *ie*, the report of the General Hospital and Tun Hussein Onn Eye Hospital, a sum of RM10,000 was awarded as general damages. This court found liability in favour of the plaintiff. (paras 16 & 17)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Caparo Industries Plc v. Dickman [1989] p 798 ***(refd)***

Donoghue (or McAlister) v. Stevenson [1932] All ER Rep 1 ***(refd)***

Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***

Marc Rich & Co AG v. British Rock Marine Co Ltd [1995] 3 All ER 307 ***(refd)***

Watson v. Buckley, Osborne, Garrett & Co Ltd v. Wyrovoys Products Ltd [1940] 1 All ER 174 ***(refd)***

For the plaintiff - Joseph Iruthayam; M/s Joseph Iruthayam & Co
For the defendant - S Kanagasabapathi; M/s Kanaga, Suresh & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Prasad Sandosham Abraham JC:

[1] The plaintiff's pleaded case against the defendant is for breach of contract and/or breach of duty in the defendant's selling of an impact drill model no. Z1J-DQ75-RE (the said product) to the plaintiff by the defendant.

[2] The facts in this case are quite straight forward. The plaintiff saw an advertisement in the newspaper taken out by the defendant offering for sale several items at its store in Johor Bahru including the said product (see bundle B at p. 2). In the said advertisement it was represented that the said product was SIRIM approved, imported with the approval of the Suruhanjaya Tenaga and be sold at the price of RM49.90. The defendant is a major hypermarket carrying a worldwide brand named Carrefour. The plaintiff having seen the advertisement found it to be a good offer and competitive in price travelled 45 miles from Kulai to Johor Bahru to purchase the said product.

[3] Evidence shows that the plaintiff took the box containing the said product from the shelves, paid for it at the cashier and went back home.

[4] The plaintiff attempted to use the said product by drilling a hole for curtain railings. The drill bit attached to the drill bent. The plaintiff then replaced the bent drill bit with another drill bit from the box. The said product came in a box which did not contain a manual of instructions. This caused the drill when in use to vibrate and hit the plaintiff on the side of his face causing injury to the plaintiff.

[5] The defendant in evidence confirmed that there was no SIRIM approval for the said product and neither was their approval for the importing of the said product. The plaintiff suffered injury and loss. The plaintiff now brings this suit against the defendant.

[6] At the outset, the plaintiff's case is grounded on breach of contract and breach of duty of care. The court rejects the plaintiff's plea for breach of contract as the contract was for the purchase of the said product which was precisely what the plaintiff did.

[7] However the court is of the view the defendant owes the plaintiff a duty of care to ensure that the product did not suffer from any latent defects and could have been used safely by the Plaintiff. However on the facts this was not so. Reference is made to the case of *Watson v. Buckley, Osborne, Garrett & Co Ltd v. Wyrovoys Products Ltd* [1940] 1 All ER 174 which appears to impute a duty of care on the defendant towards the end user. The facts of the above cited case are as follows. The plaintiff had his hair dyed by the first defendant at her hair-dressing establishment with a product which was manufactured by the third defendants and distributed by the second defendants. The product used consisted of the dye proper and a fixative lotion. The latter was intended to contain a four percent solution of acid to be diluted to a two percent solution before it was applied to the head. The distributors advertised the product as absolutely safe and harmless and as positively needing no preliminary test before use. The plaintiff decided to try it. The hairdresser without negligence applied it to his head strictly in accordance with the distributors' directions as to diluting the lotion and otherwise.

[8] In fact, it was found that the lotion used was a ten percent solution instead of a four percent solution and as a result the plaintiff contracted dermatitis. The solution had not been examined by the distributors before they passed it on to the first defendant. The distributors had, in the course of their negotiations with the manufacturers, been informed that the solution should not be more than a four percent solution but took no precautions to make strict conformity with this requirement a term of their contract with the manufacturers, nor did they at any time test the solution supplied. The plaintiff claimed damages against the hairdresser in contract and against the distributors in tort for negligence.

[9] Citing Stable J in this case: "The question is now whether or not it was the negligence of the distributor which did the damage. I think that it was. I do not think that the distributor can escape liability for gross carelessness, where the consumer has been injured, by saying: "The initial mistake was made by someone

for whose actions I am not responsible." I think that, if there had been any doubt as to the duty (the two questions are really interdependent, but assume the duty was there) the plaintiff here could have sued both defendants. The negligent act of the manufacturer was putting in the acid in too strong a solution. The negligent acts of the distributor were the various acts and omissions and representations which intervened between the manufacture of the article and its reaching Watson."

[10] I also make a reference to the classicus in this area of law ie, *Donoghue (or McAlister) v. Stevenson* [1932] All ER Rep 1 on the point.

[11] On evidence before the court based on the above said principle, I hold that the defendant owes a duty of care to the plaintiff based on aforesaid authorities, for the following reasons:

(i) The said product was imported from the manufacturer in China through a company known as Seng Huat Heng Hardware Sdn Bhd (the supplier) and thereafter by virtue of arrangements between the defendant and the supplier, the product was placed on the shelves of the defendant's hypermarket in Johor Bahru.

(ii) Under these circumstances, it is just and fair that the law imposes a duty of care on the defendant to the plaintiff to at least ensure that the product had SIRIM approval, was imported with approval from Suruhanjaya Tenaga. The defendant admits they only did random checking on some of the boxes containing the said product but did not do a complete check before the products were placed on the shelves of the defendant's hypermarket. The defendant relied purely on the representation of the supplier. DW1 in her evidence actually says they were not too concerned to ascertain the position with regards to SIRIM approval as placing in the advertisement the product was SIRIM approved was good for sales.

(iii) The box containing the said product did not have a manual or book of instructions. It is clear from the evidence that the plaintiff was influenced by the fact that and was assured to buy the said product as it was being sold by Carrefour on its shelves at RM49.90.

[12] The test in determining whether the defendant owes a duty of care to the plaintiff is to apply the principle now ingrained in the common law as to who is our neighbour. I can do no better than to quote Lord Atkin in *Donoghue v. Stevenson (supra)* at p. 99 para H;

> ... The rule that you are to love you neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question

[13] In short, a duty of care maybe held to exist when following factors are fulfilled namely:

(a) There is a close and direct relationship or proximity between the plaintiff and the defendant.

(b) Any damage suffered by the plaintiff is reasonably foreseeable. A defective or underperforming product would cause the injury that was caused in our case and it is for this very reason the said product required SIRIM approval before approval could be granted to import the said product by the supplier.

(c) The circumstances as a whole must be such that it is fair, just and reasonable for the imposition of the duty of care and the court is of the view that this ingredient has been satisfied from the evidence led by the plaintiff. (*Marc Rich & Co AG v. British Rock Marine Co Ltd* [1995] 3 All ER 307). See also *Caparo Industries Plc v. Dickman* [1989] p. 798 particularly at p. 802 and 803. The test in *Caparo*'s case has been accepted by our Court of Appeal in *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585, CA.

[14] Whilst I have found the defendant liable to the plaintiff for breach of its duty of care to the plaintiff and the damages suffered by the plaintiff were foreseeable, I have to address also the issue of contributory negligence raised by the defendant. The

defendant suggests that the plaintiff applied excessive pressure in the use of the said product which caused the said product to be defective. The plaintiff on the other hand has been trained in the use of a drill like the said product (see bundle I p. 1). At any rate, since the instruction manual was missing from the box how was the plaintiff to know the level of pressure to be applied when using the said drill.

[15] Looking at the evidence and the conduct of the plaintiff as a whole the plaintiff had taken reasonable care and has behaved reasonably and the court rejects any plea of contributory negligence on the part of the plaintiff.

[16] Obviously, Carrefour is a well-known and a trusted hypermarket in our country. If you were to ask any consumers on the street on whether they would buy an electrical item of the shelf, the international reputation of the defendant will persuade them to do so. Thus, when goods are being marketed and put for sale in Carrefour hypermarkets, the degree of trust among consumers is high due to the international standing of Carrefour. Obviously, the consumers expect the goods to be safe and merchantable.

[17] Having also looked at medical report by the plaintiff ie, the report of the General Hospital and Tun Hussein Onn Eye Hospital (see bundle B p. 32) and having heard submissions on the point I awarded the sum of RM10,000 as general damages. I make no award as to special damages as the same was not particularized nor proven. Before any award for damages can be made the party claiming it must prove both the fact of damage and the amount of damages.

[18] I refer to the judgment of Ong Hock Thye FJ (as he then was) in *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43; [1969] 1 MLJ 99, 100 (FC):

> Plaintiffs must understand that if they bring actions for damages; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost: I ask you to give me these damages." They have to prove it. (see Paul, Augustine (2000) *Evidence Practice and Procedure* 2nd Ed. s. 12. pp. 114-115 Malayan Law Journal.)" The Plaintiff had failed to do so in this case.

[19] The court did not make any order as to costs as this matter should never have been filed in the High Court.

[20] In the upshot, I found liability in favour of the plaintiff and ordered the defendant to pay the plaintiff the sum of RM10,000 as general damages with no order as to costs.